Supreme Court, U. S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NOS. 79-1028 AND 79-1029

MARVIN MANDEL, ET AL., *Petitioners,*
v.
EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT, ET AL., *Respondents.*

MARVIN MANDEL, ET AL., *Petitioners,*
v.
UNITED STATES OF AMERICA, *Respondent.*

ON PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

WILLIAM G. HUNDLEY,
Counsel for W. Dale Hess, Petitioner,
THOMAS C. GREEN,
Counsel for Harry W. Rodgers, III, Petitioner,
(No. 79-1028 only)
MICHAEL E. MARR,
Counsel for William A. Rodgers, Petitioner,
NORMAN P. RAMSEY,
WILLIAM F. GATELY,
Counsel for Irvin Kovens, Petitioner,
CHARLES G. BERNSTEIN,
WM. BRADFORD REYNOLDS,
Counsel for Ernest N. Corey, Jr., Petitioner.
(No. 79-1028 only)

ARNOLD M. WEINER,
RICHARD V. FALCON,
36 South Charles Street,
Baltimore, Maryland 21201,
Counsel for Marvin Mandel,
Petitioner, and of Counsel
for Petitioners,
EUGENE GRESSMAN,
School of Law,
University of North Carolina,
Chapel Hill, N. C. 27514,
Of Counsel for Petitioners.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

PAGE

ARGUMENT:

I. The grant of a rehearing *en banc* did not constitute a withdrawal or vacation of the panel judgment. In the absence of a judgment entered by a majority of the *en banc* court, the panel judgment remains in full force and effect 2

II. The trial court's refusal to instruct the jury on essential aspects of the alleged mail fraud, the issue which caused the *en banc* court to divide equally, is not answered by the Government 7

III. This case poses serious questions as to whether the "racketeering" provisions of the Organized Crime and Control Act can be applied literally to any businessman who commits two mail fraud violations 9

IV. The profound constitutional question posed by revival of "forfeiture of estate" as mandatory punishment for the racketeering provisions was raised in the court below. The forfeiture provision in question is a criminal forfeiture, not one *in rem*, and its enactment represents a departure from national policy which had been in existence since the establishment of this nation 11

V. Serious questions are presented by the lavish and unprecedented use of Rule 803(24), FRE, to supply critical elements of a criminal case through hearsay not within any of the recognized exceptions 15

PAGE

VI. This is the proper case for the Court to decide whether the Allen charge should continue to be used in the federal courts, and, if so, the form and manner of its permissible use 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Allen v. United States, 164 U.S. 492 (1896) 22

Best & Co. v. Maxwell, 217 N.C. 134, 6 S.E.2d 893 (1940), rev'd on other grounds, 311 U.S. 454 (1940) 7

Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972) 4, 7

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 13

Carmichael v. Eberle, 177 U.S. 63 (1900) 3, 7

Carolina Power & Light Co. v. Merrimack Mutual Fire Ins. Co., 240 N.C. 196, 81 S.E.2d 404 (1954) 7

Davis v. Davis, 601 F.2d 153 (4th Cir. 1979) 5

Drake Bakeries, Inc. v. Local 50, American Bakery & C. Wkrs., 294 F.2d 399 (2d Cir. 1961) 4

Farrand Optical Co., Inc. v. United States, 317 F.2d 875 (2d Cir. 1962) 4

Florida Motor Lines, Inc. v. Hill, 126 Fla. 586, 143 So. 261 (1932) 3

Holy Trinity Church v. United States, 143 U.S. 457 (1892) 10

Moody v. Albemarle Paper Co., 417 U.S. 622 (1974) 4

PAGE

N.L.R.B. v. McClure Associates, Inc. 556 F.2d 725 (4th Cir. 1977) 16

Panaccione v. United States, 396 U.S. 937 (1969) 22

People v. Gainer, 139 Cal. Rept. 861, 566 P.2d 997 (1977) 22

Pitton v. Atlantic Coast Line R. Co., 198 So. 503, (Fla. 1940) 6

Samuels v. Bowers, 232 N.C. 522, 61 S.E.2d 448 (1950) 7

Tenney v. Brandhove, 341 U.S. 367 (1951) 21

United States v. Bailey, 581 F.2d 341 (3rd Cir. 1978) 16

United States v. Culbert, 435 U.S. 371 (1978) ... 10

United States v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969), cert. den. sub. nom. Panaccione v. United States, 396 U.S. 837 (1969) 22

United States v. Geders, 585 F.2d 1303 (5th Cir. 1978) 5

United States v. L'Hoste, 609 F.2d 796 (5th Cir. 1980) 14

United States v. Huber, 603 F.2d 387 (2d Cir. 1979) 14

United States v. James, 590 F.2d 575 (5th Cir. 1979) 5

United States v. Kirby, 7 Wall. 482 (1868) 10

United States v. Mandel, 408 F. Supp. 679 (D. Md. 1976) 13

United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976) 8

United States v. Mathis, 559 F.2d 294 (5th Cir. 1977) 16

United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970) 23

PAGE

United States v. Stollings, 501 F.2d 954 (4th Cir. 1974) 23

United States v. Thomas, 571 F.2d 285, 290 (5th Cir. 1978) 15

Weissinger v. United States, 423 F.2d 795 (5th Cir. 1970) 5

Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247 (1953) 3, 6

Whalen v. United States, No. 78-5471 (argued November 27-28, 1979) 12

Constitutional Provisions, Statutes and Rules

18 U.S.C.:

§ 1962 13

§ 1963 ..... 12, 13, 14

§ 3563 14

28 U.S.C. § 46(c) 2

Rule 803(3) 20

Rule 803(24), Federal Rules of Evidence 15, 16

Texts and Others

S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969) 14

4 Weinstein, Evidence:

¶ 803(1)[1] 20

¶ 803(3)[05] 20

Supplement to Report of the Committee on the Operation of the Jury System, Judicial Conference of the United States 2 (1969) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NOS. 79-1028 AND 79-1029

MARVIN MANDEL, ET AL., *Petitioners,*
v.
EN BANC COURT OF APPEALS FOR THE FOURTH CIRCUIT, ET AL., *Respondents.*

MARVIN MANDEL, ET AL., *Petitioners,*
v.
UNITED STATES OF AMERICA, *Respondent.*

ON PETITIONS FOR A WRIT OF MANDAMUS AND A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

The fifty-one page brief in opposition is indicative of the importance that the Government attributes to the questions raised in both the petition for mandamus and the petition for certiorari. Petitioners suggest that the vigor and extensiveness of the dialogue between the Petitioners and the Government serve to augment the substantiality and reviewability of the various questions presented.

Petitioners file this reply not to reiterate any arguments set forth in their petitions but to clarify some of the misconceptions evidenced in the Government's opposition brief concerning some of the major questions involved. A

number of the questions presented in the petition for certiorari need no extended rebuttal. What follows is designed to place in proper focus those questions which the Government has rendered askew.

I. THE GRANT OF A REHEARING *EN BANC* DID NOT CONSTITUTE A WITHDRAWAL OR VACATION OF THE PANEL JUDGMENT. IN THE ABSENCE OF A JUDGMENT ENTERED BY A MAJORITY OF THE *EN BANC* COURT, THE PANEL JUDGMENT REMAINS IN FULL FORCE AND EFFECT.

There is one issue before this Court which need be dispositive of this entire proceeding, rendering it unnecessary to review and resolve any of the seven questions presented by the petition for certiorari. That issue is the subject for the petition for a writ of mandamus. Does an equally divided *en banc* court of appeals have any judicial power to affirm judgments of conviction when a prior panel judgment vacating those same judgments of conviction remains outstanding?

The Government's response (Br. Opp. 15) is that an affirmative answer to that question is so "well settled" by "the law on this subject" that the question is without merit for purposes of review by this Court. That response reflects a misapprehension of the evidence in this case as well as "the law on this subject."

That the answer to the mandamus question must be in the negative is demonstrable from the following factors:

1. The Government is incorrect in its contention that the *en banc* statute, 28 U.S.C. § 46(c), is concerned only with the vote necessary for "the threshhold determination" whether to rehear a case. To the contrary, "the full scope of § 46(c)" is a commitment of "the *en banc* power to the majority of active circuit judges so that a majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the

division." *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 261 (1953).

2. It follows that once a valid opinion and judgment have been rendered by a panel, only a majority of the active circuit judges has *en banc* power to rehear the case and to vacate, alter or reverse the panel's prior opinion or judgment.

3. The only *en banc* power exercised in this case by a majority of the active circuit judges of the Fourth Circuit was the order granting rehearing *en banc*. That order did not purport to alter or set aside the panel's opinion and judgment of January 11, 1979. The legal effect of the order granting rehearing *en banc* was that described by the Florida Supreme Court when confronted with an identical situation, *Florida Motor Lines, Inc. v. Hill,* 126 Fla. 586, 143 So. 261, 262 (1932), where it was said that:

> Thus the original judgment of this court that the judgment of the circuit court be reversed was merely suspended, and not annulled, vacated, or set aside, as might have been done by a special and affirmative order to that effect entered at the term during which the rehearing was granted.

It should be added that the Florida court felt that the legal effect of such a rehearing order was "controlled by the majority ratio decidendi of . . . *Carmichael v. Eberle,* 177 U.S. 63."

4. The Government nowhere denies that the panel judgment of January 11, 1979, which vacated the judgments of conviction, is still extant today, merely being in a state of indefinite suspension.

5. It cannot be said that a majority decision to rehear an appeal is *ipso facto*, a decision to set aside the judgment previously entered by a panel. To suggest that a vote to grant rehearing is necessarily a vote to set aside a panel

judgment is to ignore the clear pronouncement of this Court that "voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc . . ." *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (emphasis in original).

6. In keeping with the principle of the *Moody* case, it is well established that, in the absence of an explicit provision in an order or local rule entered by majority action, an order granting rehearing does not address the merits of the case and does not disturb the judgment previously entered by the panel. See *Bulluck v. Washington*, 468 F.2d 1096, 1122 (D.C. Cir. 1972). As we noted in our petition, and as the Court held in *Bulluck*, when rehearing is granted without vacating the panel judgment, and when the *en banc* court fails to enter a majority judgment, the panel judgment must remain in full force and effect.

7. While the Government would have this Court believe that some other rule prevails generally in other courts of appeals, and that an order granting rehearing automatically vacates the panel judgment (Br. Opp. 16-20), some of the very cases cited by the Government hold otherwise. In the Second Circuit, for example, after an *en banc* court found itself equally divided on the merits, the judges voted separately on the question whether to vacate the panel judgment, doing so only by majority vote. *Drake Bakeries, Inc. v. Local 50, American Bakery & C. Wkrs.*, 294 F.2d 399, 400 (2d Cir. 1961). In *Farrand Optical Co., Inc. v. United States*, 317 F.2d 875 (2d Cir. 1962), cited by the Government, the court granted rehearing *en banc*, keeping the panel judgment extant. The *en banc* court, finding itself equally divided on one issue, remanded the case to the panel for further consideration of its outstanding judgment. Only the dissenters from this action adopted the view espoused by the Government here. In the Fifth

Circuit, moreover, prior to the recent adoption of its local rule, it was generally recognized that an order simply granting rehearing did not operate to vacate the panel judgment. Only after the *en banc* court had considered the case and reached a decision on the merits was the panel judgment withdrawn, sometimes in its entirety and sometimes only in part. See *United States v. James,* 590 F.2d 575, 577 (5th Cir. 1979); *United States v. Geders,* 585 F.2d 1303 (5th Cir. 1978); *Weissinger v. United States,* 423 F.2d 795, 796 (5th Cir. 1970).

8. In an effort to find some kind of *en banc* action vacating the panel judgment, the Government is forced to read such action into the order granting rehearing *en banc.* But that attempt is futile by virtue of the undenied fact that a majority of the judges of the Fourth Circuit have never established any local rule or internal operating procedure of the Court which automatically accords such effect to an order granting rehearing *en banc.* Often it will defer vacating a panel decision until the *en banc* court has reheard the appeal and the majority of the active judges have determined to reach a result at variance with that of the panel. See, e.g., *Davis v. Davis,* 601 F.2d 153, 154 (4th Cir. 1979). But in the instant case, no *en banc* majority had ever entered an order or given any indication whatever that the panel opinion and judgment were deemed vacated, annulled or set aside.

9. The Fourth Circuit has discretion, of course, to adopt a local rule, by majority vote, which would provide that a vote to rehear an appeal will also be a vote to vacate the panel judgments. It cannot do so by *ad hoc* determination, however, or by some unannounced and undeclared policy. This Court declared long ago that, "It is essential, of course, that a circuit court, and the litigants who appear before it, understand the practice — whatever it may be — whereby the court convenes itself *en banc,*" and that, ". . .

(W)hatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it . . ." *Western Pac. R. Corp., supra,* at 260-61, 267.

10. In this case, the failure of the Fourth Circuit to order that the panel judgment was being vacated or reversed in effect made the actual rehearing procedure an exercise in confusion. Neither the Government nor the Petitioners were advised whether the arguments before the *en banc* court should be addressed only to the limited issues decided by the panel or should recanvass the issues raised on the original appeal. Nor were the litigants ever advised as to which judgment was before the *en banc* for reconsideration — i.e., the judgment of the panel or the judgments of conviction entered by the trial court.

11. Out of this confusion emerges one decisive fact: there is nothing in the record to indicate that the panel judgment, which vacated the judgments of conviction, was ever vacated or set aside by a majority of the active judges. The undeniable fact leads to the ultimate conclusion that the judgments of conviction were never before the *en banc* court for consideration or action thereon. The majority rule embedded in the *en banc* power conferred by § 46(c) deprives an equal division of the *en banc* court of the power to effect a withdrawal of the panel judgment and of the power to act directly on the judgments of conviction absent such a withdrawal. As was said by the Florida Supreme Court in *Pitton v. Atlantic Coast Line R. Co.,* 198 So. 503, 507 (Fla. 1940), where it again dealt with an identical situation:

> . . . (A)n equal division of the appellate court on a rehearing granted as to a judgment of reversal previously rendered leaves the said judgment of reversal in force and does not result in an affirmance of the judgment in the court below, and that the

> appellate court may, under such circumstances, order that the judgment of reversal theretofore rendered shall stand unaltered by the court, being equally divided with regard to the correctness thereof and that said judgment of reversal shall be certified to the court below without opinion.

See also, *Bulluck, supra,* at 112; *Carmichael, supra,* at 66; *Samuels v. Bowers,* 232 N.C. 522, 61 S.E.2d 448 (1950); *Best & Co. v. Maxwell,* 217 N.C. 134, 6 S.E.2d 893 (1940), rev'd on other grounds, 311 U.S. 454 (1940); *Carolina Power & Light Co. v. Merrimack Mutual Fire Ins. Co.,* 240 N.C. 196, 81 S.E.2d 404 (1954).

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON ESSENTIAL ASPECTS OF THE ALLEGED MAIL FRAUD, THE ISSUE WHICH CAUSED THE *EN BANC* COURT TO DIVIDE EQUALLY, IS NOT ANSWERED BY THE GOVERNMENT.

A remarkable metamorphosis has taken place in the Government's opposition brief, pp. 23-29. The issue that the Government claimed below to be so extraordinarily important as to warrant a rehearing *en banc,* the one issue that created the deep and even division among the *en banc* Fourth Circuit judges, has now become a mere "contention" by the Petitioners that "is without merit and does not warrant further review" (Br. Opp. 24).

This issue concerns the trial court's adamant refusal to give a bribery instruction in connection with the mail fraud counts, or to instruct relative to the defense theory as to Governor Mandel's specific intent to defraud. At the trial, the prosecution steadfastly insisted that bribery was not involved in the mail fraud charges and succeeded in convincing the trial judge not to give a bribery instruction. On the appeal to the Fourth Circuit, the Government began what Judge Widener called a "complete flip-flop" (Pet. App. 10a) and an exercise in "sophistry" (Pet. App. 11a), a campaign, which it continues before this Court (Br.

Opp. 25, n.19), to convince the world that it never really abandoned the theory of the indictment that bribery was the essence of these mail fraud charges. This accounts for the Government's present argument to this Court that the trial judge need not have given a bribery instruction relative to the mail fraud counts since he did define bribery for purposes of the racketeering counts and thus it would be unnecessary "repetition" (Br. Opp. 27).

The Government does not deny that "the essence" of the mail fraud charges, as interpreted prior to trial, was that the Governor had schemed to defraud the citizens of his lawful services by accepting bribes in exchange for official action. *United States v. Mandel,* 415 F. Supp. 997, 1005 (D. Md. 1976). However, the Government is uncomfortable with the fact that, at trial, it succeeded in convincing the trial judge that the mail fraud charges in this case did not concern themselves with bribery; that bribery was only mentioned in the racketeering count as an alternate means of committing the racketeering violations; and that the jury could convict the defendants of racketeering, as well as mail fraud, without any need of finding bribery.

The true substance of the instructions was understood by all of the participants at trial. It was no accident that the trial judge refused to give a bribery instruction in connection with the mail fraud charges and that the Government was able to argue to the jury that, under the court's instructions, the defendants could be convicted of all charges without any finding of bribery. The chief prosecutor, in his final address to the jury, stated that:

> The Court will charge you about the *quid pro quo* and he will tell you that you will need a specific intention to exchange a benefit for some official duty by a public official in order for there to be a bribery under the Maryland state law.

> I will not detail that. The Judge will do that. *What I want to explain to you or emphasize to you is that the whole concept of bribery is relevant only in Counts 21 and 23 [the racketeering counts] and that even as to those two counts you, in fact, can convict and should under the law convict even if you don't find those two briberies, if you find any two of the 20 mail fraud violations* (R. 1989-91). [Emphasis supplied.]

Consistent with this argument, the trial judge carefully omitted any reference to bribery as essential to the alleged scheme to defraud the State of the "loyal and faithful" services of the Governor and the concept of a scheme to defraud was defined only in the most general terms (R. 177-79).

Before this Court, the Government has simply reiterated the arguments that were rejected by the panel and by half of the *en banc* court. Such rejected arguments cannot mask the important context in which the trial court failed to give essential instructions as to the need to find bribery or actual knowledge of the identities of the owners of Marlboro. As Judge Widener noted (Pet. App. 11a-13a), this matter involves not only violations of accepted principles of proper jury instructions but seriously implicates the Petitioners' right to a fair trial. This, then, is a matter with merit that does warrant further review.

III. THIS CASE POSES SERIOUS QUESTIONS AS TO WHETHER THE "RACKETEERING" PROVISIONS OF THE ORGANIZED CRIME AND CONTROL ACT CAN BE APPLIED LITERALLY TO ANY BUSINESSMAN WHO COMMITS TWO MAIL FRAUD VIOLATIONS.

The Government concedes that the stated purpose of the Organized Crime Control Act, of which RICO is a central part, "is to eradicate organized crime" (Br. Opp. 35). It also concedes that this statute, made applicable in so many words to "any person" who engages in a pattern of

racketeering activity, "does not require proof that the defendant is connected with organized crime." (*Ibid*)

These concessions pose a classic confrontation between two opposing principles of statutory construction. Are the words "any person" to be read literally, or must they be confined to "any person" who falls within the organized crime classification discernible from the conceded legislative purpose? That question cannot be answered quickly or easily. RICO is a uniquely convoluted criminal statute. It creates no independent federal offense.[1] Rather, it imposes criminal sanctions on "any person" who is connected with a legitimate enterprise which is somehow affected by the profits or activities attributable to a prior predicate "pattern of racketeering activity."

In short, RICO "piggy backs" itself upon proof that someone has engaged in an organized or systematic pattern of two or more state or federal offenses — a pattern that Congress found to be the hallmark of organized criminal operations. Read in this legislative context, the "any person" language of RICO refers only to "any person who has engaged in an organized pattern of criminal activity." See *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892), and its progeny.

The literal construction suggested by the Government can well lead to "injustice, oppression, or an absurd consequence." *United States v. Kirby*, 7 Wall. 482, 486 (1868). As illustrated by the instant case, a literal reading means that any businessman charged with having used

[1] Compare *United States v. Culbert*, 435 U.S. 371 (1978), where the offense was accorded a literal interpretation with respect to the language that punishes "whoever" obstructs commerce by robbery, extortion or violence. It accords with common sense and fairness to read such a complete description of an independent federal offense in a literal manner, thereby covering both those who are professional racketeers and those who are not.

the mails on two or more occasions in furtherance of a single scheme to defraud, can also, without more, be charged and convicted under RICO as a racketeer. There presumably is an irrebuttable presumption that anyone charged with two or more separate criminal offenses has done what organized criminal elements so frequently do — i.e., engage in an organized pattern of criminal activity. Presumably, the "organized" activity of a businessman is generated by the "pattern" of mail fraud charges that the innovative prosecutor can so easily devise. The injustice, oppression and absurdity implicit in such a literal reading of "any person" serve as a warning against easy adoption of the literal principle in reading and applying RICO. And that fully justifies the grant of certiorari to explore the proper approach to the interpretation of this critical RICO language.

IV. THE PROFOUND CONSTITUTIONAL QUESTION POSED BY REVIVAL OF "FORFEITURE OF ESTATE" AS MANDATORY PUNISHMENT FOR THE RACKETEERING PROVISIONS WAS RAISED IN THE COURT BELOW. THE FORFEITURE PROVISION IN QUESTION IS A CRIMINAL FORFEITURE, NOT ONE *IN REM*, AND ITS ENACTMENT REPRESENTS A DEPARTURE FROM NATIONAL POLICY WHICH HAD BEEN IN EXISTENCE SINCE THE ESTABLISHMENT OF THIS NATION.

The Government in effect concedes that a RICO offense involves nothing significantly more or different in this case than the commission of two or more mailings in furtherance of a single scheme to defraud. That being true, a critical question arises as to the propriety of imposing multiple punishments for what in essence is primarily a single mail fraud offense.

1. The Government's main response to this issue (Br. Opp. 37-38) is that the Petitioners did not raise the point in the Court of Appeals and thus are barred from pursuing it before this Court. That assertion by the Government is inaccurate. At pages 29-31 of their Supplemental Brief for

Appellants on Rehearing In Banc, the Petitioners set forth in detail their contention that multiple punishments in this RICO context are impermissible both under the *Blockburger* and *Iannelli* tests. That brief and that argument were before the *en banc* Fourth Circuit when it rendered its decision affirming the judgments of conviction by an equally divided vote. And since that *en banc* court, by a majority vote, stated that it would have affirmed as against all of the contentions of the Appellants other than the issue as to which there was equal division, the Fourth Circuit must be deemed to have considered and reviewed this multiple punishments claim.

2. The Government commendably has noted (Br. Opp. 38) that this issue resembles the question currently pending for decision before this Court in *Whalen v. United States,* No. 78-5471 (argued November 27-28, 1979). Under established procedures, action on the instant petition respecting this issue should at least be deferred until the Court has resolved the question as posed in *Whalen.*

3. The Government exhibits confusion and misconception about the nature of the forfeiture dictated by § 1963 of RICO (see, Br. Opp. 39-42), but that very confusion and misconception add to the substantiality of the constitutional problems posed by this RICO revival of the outmoded concept of forfeiture of estate. The Government has created a dialogue about this constitutional matter that deserves full consideration and resolution by this Court.

The Government has consistently argued in this case that a RICO forfeiture is directed at a racketeer's interest in legitimate business enterprises "acquired or operated by racketeering methods" (Br. Opp. 40). Hence, it is said, a RICO forfeiture is identical with, or substantially like, a traditional *in rem* forfeiture of property used in the conduct of criminal enterprises, as to which there are no constitutional problems.

The Government's view of the nature of a RICO forfeiture, however, finds no support in the statutory provision, the legislative history or the judicial pronouncements dealing with RICO forfeitures. Basically, the Government suffers from a myopic view of the racketeering activities outlawed by RICO. Section 1962 of RICO does not criminalize the use of a business enterprise in the commission of any of the predicate crimes constituting a "pattern of racketeering activity." Instead, § 1962 makes it illegal to exploit the pattern of predicate crimes in such a way as to infiltrate or operate a legitimate business enterprise. The racketeer's resulting interest in the enterprise — which is the interest forfeitable under § 1963 — is the end rather than the means by which the predicate crimes have been committed.

The district court that imposed the forfeiture sanction in this case properly conceived of this sanction not as an *in rem* forfeiture of business interest used in the commission of the predicate mail fraud crimes but as a proceeding "against the defendant himself *in personam*." *United States v. Mandel*, 408 F. Supp. 679, 682 (D. Md. 1976).

The RICO forfeiture provision has consistently been treated by all but Government counsel as a criminal forfeiture of property, as a punishment directed at the convicted racketeers rather than at the property itself. Every court that has addressed the problem has concluded that a RICO forfeiture is a criminal forfeiture in the historical common law sense, one that perceives the "serious constitutional questions" alluded to in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). And every such court has noted that Congress intentionally drafted the RICO forfeiture provisions to

effect this highly questionable form of forfeiture of estate. To quote but from one of the judicial authorities cited by the Government (Br. Opp 41), *United States v. L'Hoste*, 609 F.2d 796, 813, n.15 (5th Cir. 1980),

> The forfeiture penalty incorporated in section 1963 differs from other presently existing forfeiture provisions in federal statutes. Under other statutes, the forfeiture proceeding is in rem against the property, since the property being forfeited is itself considered the offender, and the forfeiture is no part of the punishment for the criminal offense. By enacting section 1963, however, Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is in personam against the defendant and the forfeiture is part of the punishment. *See* S. Rep. No. 91-617, 91st Cong., 1st Sess. 124-25 (1969).

See also, *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979), relied upon by the Government (Br. Opp. 41-42), where the Second Circuit commented that, "RICO is apparently the first modern federal statute to impose forfeiture as a criminal sanction directly on an individual defendant" and that, "what is innovative about RICO is . . . that it imposes [forfeiture] directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture."

As these courts have recognized, Congress was fully aware and was intent on reviving "the concept of criminal forfeiture" that had been outlawed by statute (18 U.S.C. § 3563) since 1790, that no federal statute prior to RICO had "provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States," and that § 1963 of RICO therefore "would repeal 18 U.S.C. § 3563 by implication." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969).

None of the courts that have perceived the true nature of a RICO forfeiture have provided any satisfactory answers to the constitutional problems posed by the Petitioners. As RICO prosecutions proceed apace with the ever-present sanction of forfeiture of estate for those convicted as racketeers, the need for an authoritative resolution of constitutional validity of the forfeiture becomes more pressing.

V. SERIOUS QUESTIONS ARE PRESENTED BY THE LAVISH AND UNPRECEDENTED USE OF RULE 803(24), FRE, TO SUPPLY CRITICAL ELEMENTS OF A CRIMINAL CASE THROUGH HEARSAY NOT WITHIN ANY OF THE RECOGNIZED EXCEPTIONS.

It is true, as the Government states, that the residual exception of Rule 803(24), FRE, allows the introduction of hearsay declarations not within recognized exceptions if they are accompanied by "equivalent circumstantial guarantees of trustworthiness" and if the court makes the three explicit findings required by the Rule (Br. Opp. 42-43). The Government has failed to mention, however, that the trial judge admitted the questionable hearsay in the present case without making any of the findings which the Rule requires (Tr. 6235), and that, by its summary order, the *en banc* court similarly failed to make any such determination. In its solitary attempt to justify the disputed evidence, moreover, the Government misread the record, and its arguments should therefore be disregarded.

The failure to make the determinations required by Rule 803(24) should have rendered the evidence inadmissible as a matter of law. Cf. *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978). The special nature of the residual exception imposes on the courts the responsibility to be certain that it "be used very rarely and only in exceptional circumstances;" that it not be a "broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions;" and that it not be a means for

"major judicial revisions of the hearsay rule." Fed. R. Evid, Rule 803(24), Conf. Rept.; 28 U.S.C.A. Historical Note. There are added considerations in a criminal case for requiring strict adherence to the safeguards of the Rule. *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir. 1977).[2] To allow hearsay to be admitted under the residual exception without compliance with the plain dictates of the Rule is to sanction the very misuse which is to be scrupulously guarded against.

Furthermore, there is no authority for admitting the questionable hearsay in the present case. The Fourth Circuit failed to follow its own precedent, as established in *N.L.R.B. v. McClure Associates, Inc.*, 556 F.2d 725 (4th Cir. 1977), and none of the cases cited by the Government (Br. Opp. 43-46) would permit the type of hearsay involved here. See *United States v. Bailey*, 581 F.2d 341, 349 (3rd Cir. 1978). This case affords the Court the opportunity to require careful and sparing application of the residual exception and to forestall widespread disregard of evidentiary safeguards through careless use of Rule 803(24).

The Government does not deny that the hearsay testimony elicited from the State Senators hostile to Governor Mandel was the crucial evidence in connection with the charge that the Governor had performed official acts in exchange for participation in business enterprises. It was

[2] The Court noted in *Mathis* that, although Rule 803(24) was designed to encourage further development of federal evidentiary law, "Yet tight reins must be held to insure that this provision does not emasculate our well developed body of law and the notions underlying our evidentiary rules." The Court did not hesitate to reverse the ruling of a trial judge admitting hearsay when it was found that, "The ruling was not in harmony with the general purpose of the Federal Rules." The Court went on to declare that, "In the criminal case, let it not be forgotten that there is an added consideration to be given weight in favor of the preference for live testimony," and that, "This consideration flows from the Sixth Amendment right of confrontation." 559 F.2d at 299.

the only evidence which could be said to have supported the notion that the Governor secretly brought about the override of his own veto shortly after the other defendants had purchased Marlboro, and it was employed by the prosecution to counteract the considerable body of direct and unquestionably admissible evidence that the Governor had no part whatever in the override. This same direct evidence operated to deprive the Government's hearsay testimony of any meaningful corroboration, leading inescapably to the conclusion that the hearsay in this case was not attended by circumstantial guarantees of trustworthiness equivalent to those which attend the recognized exceptions to the hearsay rule.[3]

The contrary hearsay was elicited primarily from the Governor's most vociferous antagonists; it was attributed in large measure to unidentified declarants; and it was derived entirely from offhand remarks which were claimed to have been made in passing during the hectic and

[3] The record showed that the Governor ordinarily mounted no organized lobbying effort to sustain his vetoes, but that, notwithstanding this general policy, he instructed his chief legislative officer to inform inquiring legislators that he wanted all his vetoes, including the racetrack veto, sustained (Tr. 8295-8313). The presiding officers of both houses of the legislature testified that the veto of the racetrack bill was overridden, the same as others that day, as part of a demonstration by the legislative leadership of its independence from the Governor, not in submission to his will, and as the result of intense lobbying by legislators from the localities affected by the bill (Tr. 7746-55; 7807, 8193-97, 8219). The record also showed that the Senate gave consideration to eight vetoes of substance on the opening day of the 1972 session and that the Governor was overridden on six of them by the votes of Senators generally identified as the Governor's allies. Most of the legislators who testified at the trial, whether for the Government or the defense, had voted repeatedly to override the Governor's vetoes on the opening day of the 1972 session (Tr. 5268, 5341, 5690). The sixteen witnesses who voted to override explained that their votes were based entirely on the merits of the bill, or on its local nature, or because of the atmosphere of independence which surrounded the opening day of the 1972 session.

fast-moving events of a legislative opening day (R. 1009, 1013-14, 1108-09, 1120, 1122; Tr. 4588, 4593-95, 4883). At best, the statements amounted to nothing more than rumor and speculation, and they originated from a setting in which, as acknowledged by the Government's own witnesses, unverifiable rumor abounds (Tr. 4883).[4]

Despite the great importance that it assumed for the Government's case, the hearsay attributed to Senator Staten was so ambiguous that it was inherently lacking in trustworthiness and it could hardly have furnished a reliable basis for the jury to draw conclusions about the activities of the Governor. The evidence indicated that the comment was only made once, while Senator Staten was hurrying to the Senate chamber, and, although two Senators claimed to have heard it, they testified as to five different versions as to what they might have heard. They

[4] In some instances, as in the case of Senator Coolahan, the hearsay contradicted the public statements which had been made by the witness years earlier on the opening day of the 1972 session. Senator Coolahan was permitted to testify that he had been part of a general discussion on the floor prior to the start of the session (R. 1247). He said that he could not tell who had participated in the discussion; that it might have been those who sat near him, five of whom he named; but that "it could have been others" (R. 1249). Based on the "conversations that were going on among the Senators on the floor, none of which he could specify, Coolahan said that he had made the "observation" that "the Governor did not care whether he was overridden . . ." (R. 1249-55). Senator Lapides, a self-confessed "political enemy of the Governor," testified that he had engaged in unspecified conversations with "members of the press" and "probably . . . 50 people that particular day" (R. 1111). Lapides was allowed to state that, based on his discussions, including those with members of the press, he came to the "general feeling" or the "belief" that "the Governor wanted the veto overridden, his own veto overridden . . ." and that, "through others," the Governor was "actively seeking to have the veto overridden" (R. 1104-07). Similar testimony, not specifically described in the previous briefs, was elicited from Senators Mason (R. 1229-30, 1234), Abrams (R. 1360-63) and Thomas (R. 1168, Tr. 5250-52).

also hastened to add that they did not know if Staten was speaking for the Administration at the time (R. 1081-82), and that they did not stop to inquire whether his remark was anything more than speculation (R. 1062).[5]

We now explore the various errors which flaw the Government's argument "of ample corroboration" for the "out-of-court declarations." *First*, asserting that the Governor's legislative aides "customarily" lobbied in support of vetoes, the Government finds suspicious the "conspicuous absence of lobbying for the racetrack bill" (Br. Opp. 44). The testimony of the experienced legislators, however, including those called by the Government, was that the Governor did not ordinarily lobby to sustain his vetoes and that the racetrack bill was not of such exceptional importance as to justify departure from general practice (Tr. 5343-44, 7658, 7697, 7748-50, 7911).[6]

Second, the Government finds suspicious the fact that the racetrack bill was overridden in the Senate "by a surprisingly large majority" that included "Mandel's closest supporters." The implication of this statement is

[5] Senator Crawford, to whom the statement was allegedly made, quoted Staten, variously, as having said that the Governor "would like the veto overridden," or that the Governor "wouldn't mind having it overridden," or that the Governor "didn't care" about the veto (R. 1061, 1976-78). Senator Thomas, who claimed to have been present when Staten made his remark, testified that "Senator Staten was walking through the lounge and commented that the racing bill would be overridden, words to that effect," adding that, "I don't remember the exact words" (R. 1166). Since the remark was susceptible of so many interpretations, some innocent and others less so, and since there was no indication from the remark itself as to whether Staten was quoting the Governor or simply voicing speculation derived from any one of innumerable sources, this hearsay, on its face, was of the least reliable sort.

[6] Senator Clark, a four-term veteran of the Senate and one of the Government's principal witnesses, testified that he could not recall a specific instance when a Governor had lobbied actively for a veto to be sustained (Tr. 5343-44).

that the Senate override of the racetrack bill was a "surprising" event on the opening day of the 1972 legislative session; that the vote to override was extraordinarily large; and that, absent some prodding by the Governor, those Senators who were usually his supporters could not have been expected to have voted to override. The assertion is divorced from the realities that the Senate overrode the Governor on six of eight vetoes on the same day; that the margin of the vote on the racetrack bill was narrower than that of most of the others; that those persons identified as the Governor's supporters had voted consistently for most of the overrides; that the many overrides were due to an unusual display of independence which accompanied the opening of the 1972 session; and that, in the case of the racetrack bill, sixteen witnesses, half of them called by the Government, explained, persuasively, that their votes were brought about by factors which had nothing to do with the Governor (See p. 17 above).

Third, it is misleading to analogize the hearsay testimony to "present sense impressions" (Br. Opp. 45). The argument flies in the face of the principal limitation of present sense impression testimony, i.e., that a witness may not recount "a statement of . . . belief to prove the fact . . . believed." See, Rule 803(3), FRE. The purpose of this safeguard is to protect the factfinding process from speculation and to preserve the very integrity of the hearsay rule. 4 Weinstein, *Evidence*, ¶¶ 803(1)[1], 803(3)[05]. In this case, the Government seeks to use professions of present sense impression in a manner which is contrary to this basic limitation and for the express purpose of proving the cause of the impressions.

Fourth, the Government had stated, incorrectly, that the "availability of the declarants" was a strong indication of the reliability of the hearsay (Br. Opp. 46). The statement

overlooks the fact that the prosecutors urged the trial court to receive the hearsay precisely because many of the declarants could not be identified and because of failures of recollection among those who might have been the declarants (First Trial Tr. 3496-97). The Government notes that more than half of the surviving legislators testified in this trial (Br. Opp. 46). It fails to note further, however, that not one of these witnesses acknowledged that he was the declarant for any of the hearsay described by others, and, most significantly, that each of these witnesses explained that his own vote had been due to factors independent of the Governor and contradictory of the conclusions suggested by the hearsay (See p. 17 above).

The Government seems to argue that the best interests of the judicial process are served by allowing a federal criminal trial to be turned into a free-wheeling discussion in which the principal actors are encouraged to recount their own versions of some legislative drama. This Court should accept review of the present case to reaffirm the wisdom, expressed long ago in *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951), that, "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and [are] as readily believed," and that, "Courts are not the place for such controversies."

VI. THIS IS THE PROPER CASE FOR THE COURT TO DECIDE WHETHER THE *ALLEN* CHARGE SHOULD CONTINUE TO BE USED IN THE FEDERAL COURTS, AND, IF SO, THE FORM AND MANNER OF ITS PERMISSIBLE USE.

The Government suggests no valid reason for this Court to defer further a resolution of the uncertain status of the *Allen* charge in the federal courts. The extraordinary intensity of the jury deliberations in this case, and their almost unprecedented length, suggest strongly that this is the time and case for the propriety of the *Allen* charge to be reviewed. This case also presents the opportunity to

explore the many ramifications implicit in the giving of such a charge because of the closeness of the issues, the jury's first announcement that it was unable to find any of the defendants guilty of a scheme to defraud and the trial judge's gratuitous departure from the form of charge suggested by the ABA.

The *Allen* charge, often called the "dynamite charge," has had a controversial history ever since its rather cursory approval more than 83 years ago in *Allen v. United States,* 164 U.S. 492, 501-02 (1896). The instruction itself was only summarized "in substance" by the Court in that case, and has not since been assessed or reviewed by this Court.

The charge, with all its formulations in various lower court opinions, has been subjected to a withering barrage of attacks largely on grounds that it is coercive and inaccurate. Many courts have proscribed its use in any form. The latest count shows that three federal circuits and at least 23 state courts have totally disapproved the instruction, the disapproving Circuits being the Third, the Seventh and the District of Columbia Circuits. And the most recent state court to register a decree that an *Allen*-type instruction "should never again be read in a California courtroom" is the Supreme Court of California. *People v. Gainer,* 139 Cal. Rept. 861, 868-70, 566 P.2d 997, 1004-06 (1977).

Ever since its origin in 1896, the *Allen* charge has persisted "not so much as an object of commendation as it is a product of toleration." *United States v. Fioravanti,* 412 F.2d 407, 415 (3rd Cir. 1969), cert. den. *sub nom. Panaccione v. United States,* 396 U.S. 837 (1969). Certainly the objections raised in the *Gainer* opinion merit the final burial of the charge. And those considerations undoubtedly played a role in the recommendation of the

Judicial Conference of the United States that, as a matter of judicial policy, the *Allen* charge should no longer be given in the federal courts. See Supplement to Report of the Committee on the Operation of the Jury System, Judicial Conference of the United States 2 (1969).

At the same time, however, the Judicial Conference expressed its tolerance for the modified *Allen* charge recommended by the A.B.A. Project on Minimum Standards for Criminal Justice. While the Government seeks solace in the ABA tolerance of a modified *Allen* charge, the trial judge in the instant case plainly exceeded the carefully limited bounds of that recommended charge by gratuitously instructing the jury that the case is "an important one" to the Government and the defendants and that "its presentation to you has involved expense and expenditure of time by both the Government and the Defendants" (R. 311). He thereby committed error which should not go unnoticed and which merits careful review. *United States v. Sawyers,* 423 F.2d 1335, 1343 (4th Cir. 1970); *United States v. Stollings,* 501 F.2d 954, 956 (4th Cir. 1974).

The absence of uniformity on an important question of federal judicial administration serves the interests of no one. Until this Court acts to bring order, the present state of uncertainty will persist.

CONCLUSION

For these various reasons, supplementing those previously advanced by the Petitioners, both the Petition for Mandamus and the Petition for Certiorari should be granted.

Respectfully submitted,

ARNOLD M. WEINER,
RICHARD V. FALCON,
36 South Charles Street,
Baltimore, Maryland 21201,
Counsel for Marvin Mandel,
Petitioner, and of Counsel
for Petitioners,

EUGENE GRESSMAN,
School of Law,
University of North Carolina,
Chapel Hill, N. C. 27514,
Of Counsel for Petitioners.

WILLIAM G. HUNDLEY,
Counsel for W. Dale Hess, Petitioner,
THOMAS C. GREEN,
Counsel for Harry W. Rodgers, III, Petitioner,
(No. 79-1028 only)

MICHAEL E. MARR,
Counsel for William A. Rodgers, Petitioner,
NORMAN P. RAMSEY,
WILLIAM F. GATELY,
Counsel for Irvin Kovens, Petitioner,

CHARLES G. BERNSTEIN,
WM. BRADFORD REYNOLDS,
Counsel for Ernest N. Corey, Jr., Petitioner.
(No. 79-1028 only)